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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

SYSTEMS UNLIMITED, INC., A FLORIDA CORPORATION,
PETITIONER

v.

CISCO SYSTEMS, INC., A CALIFORNIA CORPORATION,
CISCO SYSTEMS CAPITAL CORPORATION, A NEVADA
CORPORATION, CAPITAL ACQUISITION CORPORATION, A
DELAWARE CORPORATION, ASSET ACQUISITION
CORPORATION, A DELAWARE CORPORATION

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Eleventh Circuit's unpublished decision in *Systems Unlimited, Inc. v. Cisco Systems, Inc.*, 2007 WL 1047064 (C.A.11(Fla.) (App. 1a) correct that it is appropriate to deny leave to amend when there is no scheduling order which precludes amendment, no trial date has been set, when discovery is still ongoing, and when the information on which the amendment is based was not disclosed until two weeks prior to the motion for leave to amend?

2. Is the Eleventh Circuit's unpublished decision in *Systems Unlimited, Inc. v. Cisco Systems, Inc.*, 2007 WL 1047064 (C.A.11(Fla.) (App. 1a) correct that the sale of software which includes all disks, CDs, and magnetic tapes, and any and all available copies thereof, and books and records related thereto, merely a license for intellectual property, but not a transaction in goods governed the Uniform Commercial Code as long held by the Tenth, Third, Seventh, and Ninth Circuits in *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 675-76 (10th Cir. 1991); *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 95 (3rd Cir. 1991); *Micro Home Base Sys., Inc. v. Dharma Sys., Inc.*, 148 F.3d 649, 654-55 (7th Cir. 1998); and *RRX Indus., Inc, v. Lab-Con, Inc.*, 772 F.2d. 546-47 (9th Cir. 1985), respectively?

RULE 29.6

Petitioner has no parent company. No publicly held company owns 10% or more of petitioner's stock.

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PETITION FOR A WRIT OF CERTIORARI

Systems Unlimited, Inc. respectfully petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit. The opinion of the Eleventh Circuit Court on the issue of denying leave to amend is in contradiction to the clearly established dictates of this Court, and the opinion on the issue regarding the Uniform Commercial Code is in contradiction to the law established by every other Court of Appeals which has examined the issue.

OPINIONS BELOW

The unreported per curiam opinion of the United States Court of Appeals for the Eleventh Circuit, dated April 6, 2007 is unofficially reported at 2007 WL 1047064 and is reproduced at Appendix A, 1a-10a.

The January 12, 2006 order of the magistrate judge of United States District Court for the Southern District of Florida, Miami Division, sitting by consent, denying leave to amend is reproduced at Appendix B, 11a-17a.

The March 16, 2006 order of the magistrate judge of United States District Court for the Southern District of Florida, Miami Division, sitting by consent, denying System Unlimited's motion for partial summary judgment and granting Cisco's motion for summary judgment is reproduced at Appendix C, 18a-20a.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered April 6, 2007. This petition is timely under 28 U.S.C. §2101(c) and Supreme Court Rule 13.1. because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

F.R.C.P.15 Amended and Supplemental Pleadings

(a) Amendments.

A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

FLA. STAT. §672.301; CAL. COM. CODE §2301.

"[t]he obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract."

STATEMENT

In 1999, Systems Unlimited owned software utilized by and licensed to Worldwide Web Systems, Inc. ("Worldwide Web"). In March 1999, two Cisco managers entered into an agreement to purchase an interest in Worldwide Web. Shortly after this agreement, these managers began extorting money from Worldwide Web. They conspired with personnel at Cisco, to threaten Worldwide Web with the destruction of its future business operations and to arrange for the withholding of large payments then due from Cisco to Worldwide Web.

Worldwide Web sought the help of law enforcement, including the FBI, to stop these illegal activities. Once the matter was turned over to law enforcement, Cisco refused to pay Worldwide Web any of the money which it was due. Cisco also refused to conduct any additional business with Worldwide Web. As a result Worldwide Web was forced to file bankruptcy.

During Worldwide Web's bankruptcy case, the bankruptcy trustee for Worldwide Web claimed the software was owned by Worldwide Web not Systems Unlimited. Accordingly, all of the equipment on which the software resided was seized by the Worldwide Web Trustee. The Trustee also demanded all of Systems Unlimited's copies of the software. Systems Unlimited contested the ownership of the software in the

bankruptcy court, but, pursuant to court order, and prior to adjudication by the bankruptcy court of ownership rights, transferred custody of the software to the Trustee, supposedly for safekeeping.

Upon this transfer, only two entities possessed copies of the software. One was the Trustee, operating by court order.[1] The second entity was Cisco, which had obtained copies of software by acquiring the assets of American Metrocom Company ("AMC"). *In re American Metrocomm Corporation, et al.*, Case No. 00-3358 (PJW), in the United States Bankruptcy Court for the District of Delaware.[2]

On July 6, 2001, Cisco, for itself and as successor to AMC, entered into the Trustee-Cisco Settlement Agreement in the Worldwide Web bankruptcy case. The agreement states that Cisco, "will purchase from the Estate free and clear of all liens, claims and encumbrances" the "software."

In the Trustee-Cisco Settlement Agreement, as well as the Amended Plan (the "Plan") and Amended Disclosure Statement, eventually approved by the

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[1] *In re Worldwide Web Systems, Inc.*, Case No. 00-16067-BKC-PGH, in the United States Bankruptcy Court, Southern District of Florida.

[2] Included in these assets were copies of the software in question, for which payment had never been received. On February 3, 2006, Cisco for the first time disclosed that the AMC hardware on which this software had been installed still existed, and was in Cisco's control. An emergency discovery motion was filed, but dismissed as moot by the March 16, 2006 summary judgment order.

bankruptcy court in the Worldwide Web bankruptcy case, there exists a representation that Cisco will be extracting the software for safekeeping. Without any confirmation of the Plan, it was required that, "the Parties shall comply with all of the terms of this Settlement Agreement immediately upon execution and prior of the Effective Date." Systems Unlimited objected to the Plan on the grounds that the software was not the Trustee's to sell. But because the extraction and preservation were to occur immediately and without court approval, Cisco now had all of the existing copies of the software.

Almost a year later, in an effort to resolve Systems Unlimited's objections to the Plan, Cisco offered that if Systems Unlimited rescinded its objection to the Plan, Cisco would then sell all of the software back to Systems Unlimited, and make no further claims of ownership.

Systems Unlimited withdrew its objection to the Plan in reliance on Cisco's promise to return the software to Systems Unlimited, and make no further claims of ownership. The intent was for Systems Unlimited to reacquire all existing copies and undisputed rights to the software.

Following confirmation of the Plan, on June 26, 2002, the Trustee of the bankruptcy estate executed a bill of sale in favor of Cisco. The bill of sale specifically defines the property being transferred as:

> any and all of the Estate's right, title and interest in any copyrights, patents, trademarks, trade secrets and other intellectual property of

> any kind associated with any software, code or data, including without limitation host controller software and billing software, whether embedded or in any other form (including, without limitation, disks, CDs and magnetic tapes), and including any and all available copies thereof and any and all books and records related thereto (all collectively called, the Software).

Likewise then, a companion bill of sale was executed by Cisco in favor of Systems Unlimited. In this bill of sale, Cisco ("Seller"):

> granted, bargained, sold, transferred and delivered, and by these presents does grant, bargain, sell, transfer and deliver unto the Buyer its successors and assigns, the following:
> Any and all of the Seller's right, title and interest in any copyrights, patents, trademarks, trade secrets and other intellectual property of any kind associated with any software, code or data, including without limitation host controller software and billing software, whether embedded or in any other form (including, without limitation, disks, CDs and magnetic tapes), and including any and all available copies thereof and any and all books and records related thereof and any and all books and records related thereto obtained by Seller from the bankruptcy estate of Worldwide Web Systems, Inc. (all collectively called, the Software).

(App.2a).

None of the disks, CDs, or tapes containing the software were ever delivered by Cisco, nor were any of the books and records related thereto. Cisco delivered nothing.

On June 26, 2004, Systems Unlimited filed a civil action against Cisco, in the Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida, for damages in excess of $15,000.00 pursuant to Florida Statutes Sections 672.711 and 672.713. The complaint alleged claims for breach of contract and failure to deliver property described in the Bill of Sale executed by Cisco pursuant to the Uniform Commercial Code. Cisco, thereafter, filed a notice of removal to the United States District Court for the Southern District of Florida on August 31, 2004.

Over a year later, on September 14, 2005, Cisco filed its initial answer and affirmative defenses which alleged, in part, that the software never existed or that Cisco never received the software. On November 16, 2005, contrary to its answer and affirmative defenses, Cisco produced documents which conclusively demonstrated that they had possession of the software in question and had tested its operation. On November 30, 2005, with ten weeks of discovery remaining, Systems Unlimited filed a motion for leave to amend the complaint to include additional causes of action based in fraud, negligence and conversion. Over six weeks later, on January 12, 2006, the magistrate judge, sitting by consent, denied leave to amend. (App.11a).

On March 16, 2006, the magistrate judge denied System Unlimited's motion for partial summary judgment and granted Cisco's motion for summary

judgment by holding that the "as is, where is" provision of Cisco's Bill of Sale relieved Cisco of the obligation to actually deliver the software. (App.17a). Systems Unlimited timely filed a notice of appeal on April 5, 2006.

Adopting an entirely different rationale, in an unpublished, per curiam opinion on April 6, 2007, the Eleventh Circuit Court of Appeals, affirmed the denial of leave to amend, and held that the sale of software is a license for intellectual property, but not a transaction in goods governed the Uniform Commercial Code. (App.9a).

REASONS FOR GRANTING THE PETITION

The decision of the Eleventh Circuit regarding leave to amend conflicts with the dictates of this Court. By not permitting leave to amend when there was no scheduling order which precluded amendment, when no trial date had been set, when discovery was ongoing, and when the information on which the amendment was based was not disclosed until two weeks prior to the motion for leave, the decision of the Eleventh Circuit is contrary to clearly established law. Foman v. Davis, 371 U.S. 178, 182 (1962).

Moreover, the undisputed facts are that Cisco delivered no software to Systems Unlimited. The express terms of the Bill of Sale require delivery of "all disks, CDs, and magnetic tapes and including any and all available copies thereof," and "books and records related thereto." This was the same language by which Cisco acquired all copies of the software and which Cisco admits required delivery of the software to them.

In order for the trade secrets to be transferred, as required by the bill of sale, all physical copies of the software would need to be delivered. The sale of software is a sale of goods to which the Uniform Commercial Code applies. *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 675-76 (10th Cir. 1991); *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 95 (3rd Cir. 1991); *Micro Data Base Sys., Inc. v. Dharma Sys., Inc.*, 148 F.3d 649, 654-55 (7th Cir. 1998); *RRX Indus., Inc, v. Lab-Con, Inc.*, 772 F.2d. 543, 546-47 (9th Cir. 1985). The Eleventh Circuit decision conflicts with the clearly established law of the Third, Seventh, Ninth and Tenth Circuits and serves to remove the protections of the Uniform Commercial Code from transactions involving sales of software.

The bill of sale evidences an agreement to convey goods to Systems Unlimited. In that Cisco delivered nothing, the petition for a writ of certiorari should be granted.

I. The Opinion Denying Leave to Amend is Contrary to the Dictates of this Court

Federal Rule of Civil Procedure 15(a) requires that leave to amend "shall be freely given when justice so requires," and does not include any requirement of a showing of good cause prior to granting leave to amend. This Court has emphasized that "this mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 182 (1962). In that "this mandate is to be heeded," there must be a "justifying reason," for a court to deny leave. See *Id.*; see also *Halliburton & Assoc. v. Henderson, Few & Co.*, 774 F.2d 441, 443 (11th Cir. 1985) (stating that a "substantial reason" is needed). "A district court's

discretion to dismiss a complaint without leave to amend is 'severely restrict[ed]' by FED.R.CIV.P. 15(a), which directs that leave to amend 'shall be freely given when justice so requires.'" *Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir.1988)(quoting) *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 (Former 5th Cir.1981). Where it appears a more carefully drafted complaint might state a claim upon which relief can be granted, a district court should give a plaintiff an opportunity to amend his complaint instead of dismissing it. See *Friedlander v. Nims*, 755 F.2d 810, 813 (11th Cir.1985); *Dussouy*, 660 F.2d at 597-99.

A. No Scheduling Order, No Trial Date and Ten Weeks of Discovery Remaining

On November 30, 2005, Systems Unlimited sought to amend its original complaint to add additional causes of action for: (a) fraud; (b) conversion; and (c) negligence. There was no scheduling order which prescribed a date by which requests for leave to amend need be filed, ten weeks of discovery remained[3], and a trial date had not been set. Cisco's original answer, and accompanying twelve affirmative defenses, only had been on file since September 14, 2005.

A virtually equal number of depositions occurred after the motion for leave to amend had been filed as

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[3]The Court of Appeals incorrectly states that only two days of discovery remained. The January 10, 2006 order clarifying the scheduling order confirmed the parties understanding that the discovery deadline was February 10, 2006, ten weeks after the motion for leave to amend had been filed.

had occurred before it. The timing of the filing of the motion for leave to amend fell approximately half way between Cisco's September 16, 2006 original answer and pleading of twelve affirmative defenses, and the close of discovery. No deadlines had passed when the motion for leave to amend had been filed.

B. The April 7, 2005 Hearing Did Not Set a Deadline to Amend

The District Court and Court of Appeals inappropriately base arguments for denying the amendment on comments at the April 7, 2005 hearing. This "you snooze, you lose" argument lacks both due process and logic. In the absence of a court order, a scheduling order, or a trial date, comments made at a discovery hearing suggesting an amendment should not form the basis to deny an opportunity to test a claim on the merits. Although pleadings in other cases may have alleged fraud, conversion and negligence on the part of Cisco, it was not until Cisco's own production documents demonstrated that they had the software, that such a pleading was warranted here. This evidence was adduced in this case only two weeks prior to the request for leave to amend.

In quoting the April 7, 2005 hearing, the Court of Appeals fails to recognize the most important point. The importance of the quotation from the hearing is not the court stating, "you may have to amend," but in recording Cisco's defense to the case: "they (Cisco) never got anything." All of this changed on November 16, 2005, two weeks prior to the request for leave to amend, when Cisco produced documents which conclusively demonstrated that they had possession of

the software in question and had tested its operation. These documents showed clearly that Cisco was engaging in fraud, conversion and negligence which justified amending the complaint.

Allegations in a complaint must have "evidentiary support" to the best of a party's "knowledge, information, and belief, formed after an inquiry reasonable under the circumstances." FED.R.CIV.P. 11(b)(3). As such, the "filing of a pleading warrants, among other things, that its 'allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.'" *Loggerhead Turtle v. County Council of Volusia County*, 148 F.3d 1231, 1256 (11th Cir. 1998). Therefore, in order to comply with RULE 11, Systems Unlimited could not seek to amend its complaint until after it was able to make a reasonable inquiry. This inquiry was only concluded after Cisco produced the documents on November 15, 2005.

The Court of Appeals decision rewards Cisco for denying discovery for some sixteen (16) months and forcing numerous motions to compel. When Systems Unlimited was finally able to get the requested discovery, the Court of Appeals finds that Cisco will suffer "undue delay." The alternative for Systems Unlimited would have been to ignore RULE 11 and the duty to conduct a reasonable inquiry of the allegations to support a claim for fraud and simply to have sought to amend the complaint prior to Cisco producing documents that served as the evidentiary basis for the allegations raised in the Proposed Amended Complaint.

C. The Panel Decision is Against the Dictates of this Court

Following the dictates of FEDERAL RULE OF CIVIL PROCEDURE 15(a), this Court has required considerable leniency in allowing plaintiffs to amend their complaints whenever justice so requires. See *Foman v. Davis*, 371 U.S. 178, 181-82, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962) ("The FEDERAL RULES reject the approach that pleading is a game of skill in which one misstep . . . may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." quoting *Conley v. Gibson*, 355 U.S. 41, 48, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)); *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2nd Cir. 1991). Other courts have found that "mere delay, . . . absent a showing of bad faith or undue prejudice, does not provide a basis for the district court to deny the right to amend." *Richardson Greenshields Securities*, 825 F.2d at 653 n. 6 (internal citations omitted); See also *Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973) ("We know of no case where delay alone was deemed sufficient grounds to deny a Rule 15(a) motion to amend."); *Journal Publishing Co. v. American Home Assurance Co.*, 771 F. Supp. 632, 637 (S.D.N.Y. 1991).

Even the case upon which the Court of Appeals relies is far different than this case. In *Maynard v. Bd. of Regents ex rel. Univ. of S. Fla.*, 342 F.3d 1281, 1287 (11th Cir. 2003), the district court encountered vastly different circumstances. In that case, a motion was made to amend on the last day of discovery; in this case, ten weeks of discovery remained. In that case, depositions were closed; in this case a nearly equal

number of depositions would occur after filing the motion for leave to amend. In that case, there was no explanation of why the amendment was not made earlier; in this case, the amendment was made two weeks after long sought discovery conclusively demonstrated that Cisco had in its possession the software in question. In the early stages of the litigation, Cisco had maintained that the software did not exist or that it did not receive any of the copies of the software. On July 14, 2005 during the deposition Mark E. Michels, Cisco's Rule 30(b)(6) witness, Systems Unlimited learned that Cisco had never made any attempt to locate any copies of the software. And then on November 16, 2005, Cisco finally produced documents which conclusively demonstrated that they had possession of the software in question and had tested it.

The characterization that the motion for leave to amend was at the "eleventh hour" is not accurate. Apart from Cisco changing its story, it is hard to see what this was supposedly the "eleventh hour" of. The motion for leave to amend had been filed for six weeks prior to the January 12, 2006 order. Six weeks of discovery had passed since the motion had been filed, but a month remained. Again, this was Systems Unlimited's first motion to amend, with no trial scheduled, and no scheduling order being violated. The "eleventh hour" characterization as it relates to Systems Unlimited is wholly incorrect.

The proposed amended complaint including only three additional causes of action for fraud, conversion and negligence, can hardly be viewed as a burden on Cisco. Presumably, Cisco had known of the facts (at

least in relation to the fraud and conversion claims) since well before the beginning of the case. If anything, the April 7, 2005 hearing should serve to show that Cisco cannot be surprised by the amendment.

The Eleventh Circuit has held that, "any amendment to an original pleading necessarily involves some additional expense to the opposing party," but adding that this will not justify denial of leave where the additional expense is "of nominal proportions." *Loggerhead Turtle v. Council of Volusia City*, 148 F.3d 1231, 1257 (11th Cir. 1998). "The lengthy nature of litigation, without any other evidence of prejudice to the defendants or bad faith on the part of the plaintiffs, does not justify denying the plaintiffs the opportunity to amend the complaint." *Bryant v. Dupree*, 252 F.3d 1161, 1164 (11th Cir. 2001). See also *Floyd v. Eastern Airlines, Inc.*, 872 F.2d 1462, 1490 (11th Cir. 1989) ("The mere passage of time, without more, is an insufficient reason to deny leave to amend.") *rev'd on other grounds*, 499 U.S. 530 (1990). In this case, Systems Unlimited already had obtained Michels' deposition testimony and finally received the relevant documents from Cisco in connection to the proposed fraud, conversion and negligence claims, therefore, any additional discovery on the part of Systems Unlimited as to these additional claims would likely be minimal and could have likely been concluded prior to the expiration of the discovery cutoff.

Prejudice is the key factor to be evaluated in deciding a motion to amend in the absence of a specific factor, such as flagrant abuse, bad faith, futility of amendment, or truly inordinate and unexplained delay. *Lange v. Cigna Individual Financial Servs. Co.*, 759 F.

Supp. 764, 769 (D. Kan. 1991). Prejudice under Rule 15 "means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change of tactics or theories on the part of the other party." *Deakyne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3rd Cir. 1969); see *LeaseAmerica Corp. v. Eckel*, 710 F.2d 1470, 1474 (10th Cir. 1983). The party opposing the amendment has the burden of showing prejudice. See *Beeck v. Aquaslide ' N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977). Cisco fails to even approach meeting its burden.

Without any evidence Cisco asserted that it would have been unduly prejudiced by having to, "conduct significant additional discovery, retain additional experts and push back the trial date," if Systems Unlimited was allowed to amend the complaint. However, Cisco offered no support or further elaboration for this position. Moreover, Cisco failed to provide any discussion or support for its proclamation that other purported additional experts would need to be retained in connection to the causes of action for fraud, negligence and conversion set forth in the Proposed Amended Complaint. Finally, Cisco's argument that it would suffer prejudice by having the trial date pushed back, in light of the fact that it took over a year to answer the complaint, and sixteen months to answer discovery, could not possibly have been taken seriously.

The lapse of time from the filing of the original complaint to the filing of Systems Unlimited's Motion to Amend was not caused by Systems Unlimited attempting to gain an unfair advantage, but was caused by Cisco not producing relevant documents until only a

few days before Systems Unlimited's filing of the Motion to Amend. In light of the discovery produced two weeks prior to the proposed amendment, Systems Unlimited's motion for leave to amend should have been granted. *Sweetheart Plastics, Inc. v. Detroit Forming, Inc.*, 743 F.2d 1039, 1044-45 (4th Cir. 1984) (court abused its discretion in denying amendment when evidence supporting amendment was discovered shortly before trial).

II. The Panel Decision Regarding Delivery is Wrong

A. The UCC Applies to The Bill of Sale

The Eleventh Circuit decision conflicts with the clearly established law of the Third, Seventh, Ninth and Tenth Circuits. In misreading a Federal Circuit decision, the Eleventh Circuit is the first circuit court to decide that the Uniform Commercial Code does not apply to the sale of software. Without exception courts have held that the Uniform Commercial Code applies to transactions involving software. *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 675-76 (3d Cir. 1991); *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91, 95 (3rd Cir. 1991); *First Nationwide Bank v. Florida Software Services, Inc.*, 770 F.Supp. 1537, 1543 (M.D. Fla. 1991). Whereas copies of software may include intellectual property, the copies themselves are goods. *Micro Data Base Sys., Inc. v. Dharma Sys., Inc.*, 148 F.3d 649, 654-55 (7th Cir. 1998); *Advent Systems Ltd. v. Unisys Corp.*, 925 F.2d 670, 675-76 (10th Cir. 1991); *RRX Indus., Inc. v. Lab-Con, Inc.*, 772 F.2d. 543, 546-47 (9th Cir. 1985). Systems Unlimited is

entitled to rely upon the Uniform Commercial Code in a bill of sale for all copies of the software.

The Court of Appeals inappropriately relies upon a note *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1359 n.2. (Fed. Cir. 2005). However, that case dealt with a license to produce "a board game similar in some respects to Tic Tac Toe" not with a sale of the ownership of software. A license is neither a contract for nor an ownership interest in the subject property. 53 C.J.S. Licenses § 92, at 441 (1987). See also *TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 687 (9th Cir. 1990); *U.S. Industries, Inc. v. Otis Engineering Corp.*, 277 F.2d 282, 291 (5th Cir. 1960). "A license is not an assignment of any interest in the patent. It is a mere permission granted by the patentee." *Henry v. A. B. Dick Company*, 224 U.S. 1, 24 (1912).

In the instant case there is a sale of the software itself, both the intellectual property and all the physical copies; both the thoughts and all the pages they were written upon. The Bill of Sale defines Cisco as "Seller" and Systems Unlimited as "Buyer." Pursuant to §2-301 of the Uniform Commercial Code, "[t]he obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract." FLA. STAT. §672.301; CAL. COM. CODE §2301.

Cisco's bill of sale provides that Cisco:

> granted, bargained, sold, transferred and delivered, and by these presents does grant, bargain, sell, transfer and deliver unto the Buyer, its successors and

> assigns, the following: Any and all of Seller's right, title and interest in any copyrights, patents, trademarks, trade secrets, and other intellectual property of any kind associated with any software, code or data, including without limitation, host controller software and billing software, whether embedded or in any other form (including without limitation, disks, CDs and magnetic tapes), and including any and all available copies thereof and any and all books and records related thereto obtained by Seller from the bankruptcy estate of Worldwide Web Systems, Inc. (all collectively called, the "Software").

(App.2a). Pursuant to Cisco's bill of sale, Cisco was obligated "by these presents" to "deliver unto the Buyer. . . host controller software and billing software, whether embedded or in any other form (including without limitation, disks, CDs and magnetic tapes), and including any and all available copies thereof and any and all book and records related thereto."

In *Orange Belt Land Exchange v. Speer*, the Supreme Court of Florida held that:

> on execution and delivery of a bill of sale the title to the property described and constituting the subject of the sale passes from the seller to the buyer and entitled the latter to immediate possession provided the instrument evidences a present sale, properly identifies the goods, and was not procured by fraud.

129 So. 779, 781 (Fla. 1930).

Cisco admits that its bill of sale from the Worldwide Web Trustee required physical delivery of the software. It is impossible then that the bill of sale from Cisco to Systems Unlimited did not require delivery in that the two bills of sale use the same language.

Cisco did not put and hold conforming goods at Systems Unlimited's disposition and provide notice reasonably necessary to enable it to take delivery. Cisco is liable for breach of contract. *Gill Equipment Co. v. Kaufman*, 196 F.2d 800, 802 (5th Cir. 1952); FLA. STAT. §672.503; CAL. COM. CODE §2503. It is undisputed that Cisco failed to deliver any of the software to Systems Unlimited in accordance with its duty to do so under the Bill of Sale.

B. The Express Terms of the Bill of Sale Require Delivery

If what was being conveyed was merely rights to intellectual property, such conveyance would not be by a bill of sale but would have only included a simple assignment. However, the expressed cumulative references in the Bill of Sale to delivery of "all disks, CDs, and magnetic tapes and including any and all available copies thereof," and "books and records related thereto," belies the interpretation that the Bill of Sale was but a mere assignment of intellectual property. This interpretation cannot be the case. Cisco had the only copies of the software. Nothing transferred without delivery of those copies.

As a matter of law, in order for the trade secrets to be protected, all of the physical goods must also transfer. The rationale is simple: under either California or Florida law, for information to be a trade secret, it must be kept secret. FLA. STAT. § 688.002(4); CAL. CIV. CODE §3426, et seq. To say it another way, a trade secret cannot be transferred unless "all disks, CDs, and magnetic tapes and including any and all available copies thereof," and "books and records related thereto," are **delivered** as well. In the instant case, where Cisco has the only copies of the software, in order for the Cisco bill of sale to convey the trade secret, all of the copies of the software, from what ever source, would need to be delivered to Systems Unlimited so that it can maintain its acquired trade secret.

CONCLUSION

ACCORDINGLY, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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(any footnotes trail end of each document)

No. 06-12357 Non-Argument Calendar

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SYSTEMS UNLIMITED, INC., a Florida corporation,

Plaintiff-Appellant,

versus

CISCO SYSTEMS, INC., a California corporation, CISCO SYSTEMS CAPITAL CORPORATION, a Nevada corporation, CAPITAL ACQUISITION CORPORATION, a Delaware corporation, ASSET ACQUISITION CORPORATION, a Delaware corporation, Defendants-Appellees.

April 6, 2007, Decided

April 6, 2007, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For Systems Unlimited, Inc., Appellant Geoffrey Neil Courtney, Attorney at Law, AUSTIN, TX; Arthur Halsey Rice, Rice Pugatch Robinson & Schiller, FT LAUDERDALE, FL; Mark S. Roher, Rice Pugatch Robinson & Schiller, FT LAUDERDALE, FL.

For Cisco Systems, Inc., Cisco Systems Capital Corporation, Capital Acquisition Corporation, Asset Acquisition Corporation, Appellees: Robert M. Brochin, Morgan, Lewis & Bockuis, MIAMI, FL.

JUDGES: Before BLACK, CARNES and MARCUS, Circuit Judges.

OPINION

PER CURIAM:

Following the settlement of a dispute between Systems Unlimited, Inc. and Cisco Systems, Inc. over the ownership of certain intellectual property, Cisco agreed to covey the property to Systems. In the resulting bill of sale, Cisco:

granted, bargained, sold, transferred and delivered, and by these presents does grant, bargain, sell, transfer and deliver unto [Systems], its successor and assigns, the following:

Any and all of [Cisco]'s right, title and interest in any copyrights, patents, trademarks, trade secrets and other intellectual property of any kind associated with any software, code or data, including without limitation host controller software and billing software, whether embedded or in any other form (including without limitations, disks, CDs and magnetic tapes), and including any and all available copies thereof and any and all books and records related thereto by [Cisco] . . . .(R1:2:Compl., Ex.A.)

Cisco never delivered any of the software to Systems. Alleging that it had been damaged by the non-delivery, Systems sued Cisco for breaching the bill of sale contract and for violating the attendant obligations to deliver the software under the Uniform Commercial Code.

On November 29, 2005, the parties filed cross-motions for summary judgment. That same day, Systems moved for leave to amend its complaint to add claims for fraud, conversion and negligence.

The district court denied Systems' motion for leave to amend. The court also denied Systems' motion for summary judgment, but granted Cisco's summary judgment motion. In this appeal Systems contests both the denial of its motion for leave to amend and the judgment entered for Cisco.

I.

Systems contends that the district court abused its discretion in denying its motion for leave to amend the complaint. It argues that leave should be freely granted because it did not seek leave in bad faith or for the purpose of undue delay, and Cisco would not be prejudiced. We will reverse a district court's denial of a motion to amend only where it has clearly abused its discretion. *Henson v. Columbus Bank & Trust Co.*, 770 F.2d 1566, 1574 (11th Cir. 1985).

Federal Rule of Civil Procedure 15(a) provides that, after a responsive pleading has been served, a party may amend its complaint only by leave of court. Fed. R. Civ. P. 15(a). The rule also provides that "leave shall be

freely given when justice so requires." *Id.* The Supreme Court said that the "freely given" standard means:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."*Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962).

Here, the district court found that Systems had unduly delayed amending its complaint after deficiencies had been pointed out by the court. In an April 7, 2005 hearing before the district court on Systems' motion to compel, the district court said to Systems' counsel:

> It seems to me that if you want to somehow or other expand your claim to include the AMC items, that you have got to amend your pleading. You have got to, and I don't know what kind of claim you want to make; whether or not you want a claim of fraud, mutual mistake, or whatever . . . .
>
> [I]t may get you by a motion to dismiss, but if they never got anything, then I don't know where you are going with this, based on your pleadings and the agreements as they are right now.

That is why I said you may have to amend, but I guess you can wait until the district court rules on the motion as to whether or not you have stated a claim.(R4:32:34, 46.) The district court denied Cisco's motion to dismiss on August 25, 2005.

Systems' waited more than seven months after the court pointed out that its complaint was missing several causes of action, and more than three months after the motion to dismiss was denied, to amend its complaint. The motion for leave to amend was filed the day the summary judgment motions were due and two days before the discovery deadline was to lapse. Under similar circumstances, we have held that the district court did not abuse its discretion in denying the motion for leave to amend. *See Maynard v. Bd. of Regents ex rel. Univ. of S. Fla.*, 342 F.3d 1281, 1287 (11th Cir. 2003) ("Because we conclude that Maynard has failed to show good cause for the eleventh hour amendment, we find that the district court did not abuse its discretion by enforcing its timetable for disposition of the case.").

Systems argues that it had good cause for the late amendment since Cisco withheld a crucial piece of discovery related to the fraud until only a few weeks before the summary judgment motions were due in November. This suggestion is problematic given the district court's comments in April that Systems had a potential fraud claim. The district court found that the facts underlying the alleged fraud were "not newly discovered but rather were known to [Systems] and have been referenced by [Systems] in previous pleadings" (R3:133:1), and Systems has not shown that this finding is clearly erroneous.

The district court also found that Cisco would be unduly prejudiced if Systems were given leave to amend its complaint because discovery was set to close and summary judgment motions had already been filed. Adding three more causes of action to the complaint would require additional time and expense for discovery and an additional round of summary judgment motions.

Systems argues that the district court could have limited any additional discovery to reduce expense. However, a district court has wide latitude in refereeing discovery, and we will not question the limits set by the court unless they are clearly erroneous or not rationally supported by the evidence. *Moore v. Armour Pharm. Co.*, 927 F.2d 1194, 1197 (11th Cir. 1991) ("The trial court . . . has wide discretion in setting the limits of discovery, and its decisions will not be reversed unless a clearly erroneous principle of law is applied, or no evidence rationally supports the decision."). Systems has not made that showing.

Because Systems unduly delayed adding counts to its complaint and Cisco would be prejudiced by the late amendment, the district court did not clearly abuse its discretion in denying Systems' motion to amend.

II.

Systems also contends that the district court erred in granting summary judgment in favor of Cisco because: (1) the plain language of the bill of sale required Cisco to deliver the software; (2) the bill of sale, when read in conjunction with other contemporaneous agreements, required delivery; and (3) the UCC, which governs the

bill of sale, requires that all goods be delivered at a reasonable time. Systems is wrong on each point.

The bill of sale is interpreted in accord with its plain language absent some ambiguity. *See* Cal. Civ. Code § 1638 ("The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."); *Whitley v. Royal Trails Prop. Owners' Ass'n, Inc.*, 910 So. 2d 381, 383 (Fla. 5th DCA 2005)("The parties' intention governs contract construction and interpretation; the best evidence of intent is the contract's plain language."). n1 Here, the parties agree that the bill of sale is clear and unambiguous.

The bill of sale provides that Cisco will "grant, bargain, sell, transfer and deliver unto [Systems] . . . [a]ny and all of [Cisco]'s right, title and interest in any copyrights, patents, trademarks, trade secrets and other intellectual property of a kind associated with any software, code or data." (R1:2:Compl., Ex.A.) As the district court explained, this language unambiguously means that Cisco was required by the bill of sale to transfer to Systems all of its rights in intellectual property associated with certain software and data. There is no mention in the plain language of the contract itself of Cisco being obligated to transfer the actual software, and we will not imply any such obligation absent some good reason under law.

Systems says there are two good reasons to imply an obligation by Cisco to transfer the software. First, Systems argues that the bill of sale must be interpreted in conjunction with the settlement agreement between Systems and Cisco and other documents relating to the

intellectual property. These other agreements, Systems claims, include an obligation by Cisco to deliver the software with any conveyance of intellectual property.

Assuming without deciding that the other agreements include language requiring Cisco to deliver the software, they are not relevant here because Systems has never alleged Cisco violated these other agreements. Systems' complaint alleges only a violation of the bill of sale contract, and there is no obligation in that contract to deliver the software. The bill of sale does not reference or incorporate any other agreement. *Cf. Williams Constr. Co. v. Standard-Pac. Corp.*, 254 Cal. App. 2d 442, 61 Cal. Rptr. 912, 920 (Ct. App. 1967) ("For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties." (quotation omitted)); *Collins v. National Fire Ins. Co.*, 105 So. 2d 190, 194 (Fla. 2d DCA 1958) ("Where a written contract refers to and sufficiently describes another document, that other document or so much of it as is referred to, may be regarded as a part of the contract and therefore is properly considered in its interpretation.").

To get around this point, Systems argues that "when instruments relate to the same matters, are between the same parties, and made part of substantially one transaction, they are to be taken together." (Blue Br. 22.) It is true that this is one of the canons for construing a contract under California law. *See* Cal. Civ. Code § 1642 ("Several contracts relating to the same

matters, between the same parties, and made as parts of substantially one transaction, are to be taken together."). But it is also true that this canon, as with most others, is inapplicable where the contract that is alleged to have been breached is unambiguous. *Sonoma Falls Developers, LLC v. Nev. Gold & Casinos, Inc.*, 272 F. Supp. 2d 919, 924 (N.D. Cal. 2003) (section 1642 "is applicable only if there is ambiguity concerning the interpretation of a contract"). Here, the language of the bill of sale is unambiguous. Thus, there is no need to apply any canons of construction, including particularly section 1642.

Systems also argues that the UCC imposes a duty on Cisco to deliver the software. We will assume without deciding that Systems' reading of the UCC is correct. Even so, the provisions of the UCC only apply to contracts that deal predominately with "transactions in goods." Cal. Com. Code § 2102; Fla. Stat. § 672.102. The sale of intellectual property, which is what is involved here, is not a transaction in goods. *See Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1359 n.2 (Fed. Cir. 2005) (applying California law) ("a license for intellectual property . . . is not a sale of goods"); *see generally* Daniel R. Cahoy, *Oasis or Mirage?: Efficient Breach as a Relief to the Burden of Contractual Recapture of Patent and Copyright Limitations*, 17 Harv. J.L. & Tech. 135, 163 (Fall 2003) ("intellectual property or other information cannot be a 'good' as defined by the UCC"). Thus, the UCC does not apply. Accordingly, the plain language of the bill of sale governs and, as the district court held, it does not include a provision requiring Cisco to deliver any software.

AFFIRMED.

Footnote

1The district court did not decide whether the bill of sale was governed by Florida or California law, and we won't either since it doesn't matter to the outcome of the case.

CASE NO. 04-61127-CIV-MARTINEZ/BANDSTRA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CONSENT CASE

SYSTEMS UNLIMITED, INC., Plaintiff,

v.

CISCO SYSTEMS, INC., et, al., Defendants.

ORDER

THIS CAUSE came before the Court on (a) Defendants' Motion for Summary Judgment (D.E.104) filed on November 29, 2005; and (b) Plaintiff s Amended Motion four Partial Summary Judgment Establishing Defendants' Liability (D.E. 109) filed on November 29, 2005. The undersigned heard oral argument from counsel on these motions on February 13, 2006. Having carefully considered the motions, the responses and replies thereto, oral argument of counsel, the court file and applicable law, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion for Summary Judgment is GRANTED and that Plaintiffs Amended Motion for Partial Summary Judgment is DENIED.

Factual Background

Cisco Systems, Inc. ("'Cisco") was a creditor of world wide web Systems, Inc., a software development

company that filed for bankruptcy relief under Chapter 11 of the Bankruptcy Code on July 11, 2000. Cisco entered into a settlement agreement with the Chapter 11 Trustee through which Cisco purchased the debtor's "right, title and interest" in all of its intellectual property. Systems Unlimited. Inc. ("Systems") possessed its own claims against the estate and objected to the Trustee Settlement. On May 31, 2002, Cisco and Systems reached an amicable settlement whereby Systems agreed to cease its objections to the Trustee Settlement. In return, Cisco agreed to "convey by `quit claim bill of sale' to [Systems] any and all of the Estate's right, title and interest in Software, which [Cisco is] obtaining from the Estate pursuant to the Plan and the Cisco Settlement." Confidential Settlement Agreement and Release, May 31, 2002, p.2, Par.1 (a). Thereafter, the parties negotiated the subject bill of sale, The bill of sale at issue conveyed all right, title and interest in the software at issue on an "'AS'-IS, WHERE-IS' basis, with all faults."

Systems filed a two count complaint seeking damages for defendants' alleged failure to deliver the software transferred to Systems. The "software" at issue was described and defined in various documents filed in the bankruptcy case of In Re Worldwide Web Systems, Inc., Case No. 00 16067-BC-PGH. The first count entitled "Action on Bill of Sale" alleges a breach of contract claim; and the second count entitled "Action Pursuant to Sections 672.711 and 672.713" alleges a breach of contract pursuant to violations of enumerated UCC provisions. Defendant alleges that it is entitled to summary judgment since the bill of sale on which the action is premised does not constitute a contract on which an action can be based. Further, defendant

argues that, even if the bill of sale is deemed a contract, the language of the bill of sale itself precludes any action thereon.

Standard of Review

Under Federal Rule of Civil Procedure 56(c), a motion for summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Supreme Court further explained the movant's burden in Celotex Corp. V. Catrett, 477 U.S. 317 (1986) as follows:

In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Id. at 322. The Court further stated that "Rule 56(e)...requires a non-moving party to go beyond the pleadings and by [its] own affidavits or by the `depositions, answers to interrogatories, and admissions on file' designate `specific facts showing that there is a genuine issue for trial.'" Id. at 324. By its very terms, this standard provides that "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there will be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 24748

(1986)(emphasis in original); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). An issue of fact is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. Anderson, 477 U.S. at 245. It is "material" if it might affect the outcome of the case under the governing law. Id.

Analysis

Simply stated, this case concerns a one-page written conveyance, the bill of sale, by which Cisco conveyed to Systems any right, title, and interest held in "any and all" of the intellectual property that Cisco received from the bankruptcy estate of Worldwide Web Services, Inc. Cisco delivered the bill of sale to Systems as part of a Confidential Settlement Agreement and Release resolving the parties' competing claims against the World Wide Web Estate. Systems argues that the bill of sale in question impliedly included the obligation to deliver the software at issue. Cisco argues that the language of the bill of sale itself excluded this obligation. Certainly, a bill of sale may create contractual obligations both under the common law and the Uniform Commercial Code. However, the pertinent question herein is whether the bill of sale upon which this action is premised created any such obligations. Systems contends that the bill of sale should be interpreted as a contract that contains implied, not express, obligations for Cisco to extract intellectual property imbedded in the Estate's hardware and then to deliver tangible copies of that intellectual property to Systems. The bill of sale makes no mention of these obligations and as such does not require same.

First, it is significant to note that Systems drafted the bill of sale at issue. Second, the bill of sale expressly states that it conveyed all right, title and interest in the software at issue but specifically stated that the conveyance was made on an "'AS-IS, WHERE-IS' basis, with all faults," See, Bill of Sale. Moreover, Systems agreed that Cisco did not make and specifically disclaimed any representations, warranties, promises...of any kind or character... with respect to the software. Despite this clear language, Systems sues Cisco for implied promises allegedly contained in the bill of sale. Delivery of the software was not provided for in the bill of sale which required only the conveyance of the right, title and interest in the software.

Both parties agree that the language of the bill of sale is clear and that this Court therefore can make a decision as a matter of law as to its legal import. Ambiguity "does not exist merely because a [written instrument] can possibly be interpreted in more than one manner." Shipner v. Eastern Air Lines, Inc., 868 F.2d 401, 449 (11th Cir.1989). Instead, reliance on extrinsic evidence is warranted only when there exists a genuine inconsistency, uncertainty, or ambiguity in the meaning on the face of the instrument. Id. After careful review, the undersigned likewise finds the contract terms unambiguous.

Although Systems may now regret failing to obligate Cisco to deliver the software itself, Systems, as the framer of the bill of sale, could have done so but did not require such an obligation. In fact, Systems expressly waived any such obligation by virtue of the "as is, where is" language and the remaining provisions of the

bill of sale. Systems agreed that Cisco would deliver all right, title and interest in the software and that is what it received. Systems, by the very terms of the bill of sale, did not contract for delivery of the software. "'[C]ourts are not empowered under the guise of construction or explanation to depart from the plain meaning of the writing and insert a term or limitation not found therein." Tanner v. Title Ins. & Trust Co., 20 Cal.2d 814, 824 (Cal. 1942). Summary judgment is especially appropriate in actions such as this - involving the construction and interpretation of a written instrument- because such matters are generally for the court to determine as a matter of law. Lawyers Title Ins. Corp. v. JDC (America) Corp., 52 F.3d 1575, 1580 (11th Cir. 1995).

Based on the foregoing, Systems' claims fail as a matter of law. Accordingly, Cisco's motion for summary judgment is GRANTED and Systems' Motion for Partial Summary Judgment is DENIED.

DONE AND ORDERED in Chambers, at Miami, Florida, this 14th day of March 2006.

CASE NO. 04-61127-CIV-MARTINEZ/BANDSTRA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CONSENT CASE

SYSTEMS UNLIMITED, INC., Plaintiff,

v.

CISCO SYSTEMS, INC., et, al., Defendants.

ORDER

THIS CAUSE came before the Court, and the Court having granted defendants' motion for summary judgment by separate order, it is hereby

ORDERED AND ADJUDGED that final judgment is entered in favor of defendants and that all pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers, at Miami, Florida, this 14th day of March 2006.

CASE NO. 04-61127-CIV-MARTINEZ/BANDSTRA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CONSENT CASE

SYSTEMS UNLIMITED, INC., Plaintiff,

v.

CISCO SYSTEMS, INC., et, al., Defendants.

ORDER

THIS CAUSE came before the Court on Plaintiff's Motion for Leave to File an Amended Complaint (D.E.110) fled on November 30, 2005. Having reviewed the motion, the response and reply thereto, the court file and applicable law, it is hereby

ORDERED AND ADJUDGED that the motion is DENIED. On November 30, 2045, plaintiff filed its motion to amend its complaint. Plaintiff seeks leave to allege "new" tort-based claims for fraud, conversion and negligence. First, the undersigned finds that the allegations and facts alleged are not newly discovered but rather were known to plaintiff and have been referenced by plaintiff in previous pleadings. Plaintiff alleges that it only became aware of such information after the July 14, 2005 deposition of defendant's 30(b)(G) deposition yet provides no good cause for waiting until November 30, 2005 to file the instant motion. Additionally, plaintiff was previously cautioned by Magistrate Judge Klein that plaintiff should seriously

evaluate its need to amend its complaint on April 7, 2005. Again, plaintiff fails to state any good cause for waiting to seek leave to amend the complaint. At the request of the parties, the discovery cut off of this case has been extended. The trial date was also postponed to be rescheduled, if necessary, after the motions for summary judgment are decided by the Court. The motions for summary judgment are ripe and set for hearing and those pleadings are closed at this time, Further, the extensive discovery which has occurred in this case ends on February 10, 2006, in less than one month As such, the undersigned finds no good cause for plaintiffs belated motion to amend its complaint at this late date. Additionally, contrary to plaintiffs assertions, the undersigned finds that defendant would be unduly prejudiced if such an amendment would be allowed at the "eleventh hour" when discovery is due to close in less than one month and the parties summary judgment pleadings have been fled and set for hearing by the Court. Also, as a matter of law, the undersigned finds that the economic loss rule, whether applied under Florida or California law, would bar plaintiffs requested amendment to include tort claims, with the exception of the fraud claim.[1] Robinson Helicopter Co., Inc. v. Dana Corp., 102 P.3d 268, 272 (Cal. 2004). Based upon the foregoing, the undersigned finds that plaintiffs motion to amend is DENIED.

DONE AND ORDERED in Chambers, at Miami, Florida, this ** day of January, 2006.

Footnote

1In light of the remaining conclusions within this Order, the undersigned finds it unnecessary to discuss the fraud

claim separately since the motion to amend is denied.